No. 19-5142

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DONALD J. TRUMP; THE TRUMP ORGANIZATION, INC.; TRUMP ORGANIZATION LLC; THE TRUMP CORPORATION; DJT HOLDINGS LLC; THE DONALD J. TRUMP REVOCABLE TRUST; AND TRUMP OLD POST OFFICE LLC,

Plaintiffs-Appellants,

v.

MAZARS USA LLP,

Defendant-Appellee,

COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES,

Intervenor-Defendant-Appellee.

MOTION OF THE COMMITTEE ON OVERSIGHT AND REFORM OF THE U.S. HOUSE OF REPRESENTATIVES FOR IMMEDIATE ISSUANCE OF THE MANDATE OR, IN THE ALTERNATIVE, TO SHORTEN THE TIME TO PETITION FOR REHEARING OR REHEARING EN BANC

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The Committee on Oversight and Reform of the U.S. House of Representatives (Committee) respectfully moves for immediate issuance of the mandate or, in the alternative, for an order shortening the time to petition for rehearing or rehearing en banc to seven days from the date of the Court's ruling on this motion. Counsel for plaintiffs-appellants has stated that they oppose this motion and plan to file an opposition.

BACKGROUND

On October 11, 2019, this Court issued a divided opinion in this case affirming the district court's grant of summary judgment in favor of the Committee and holding that the subpoena issued by the Committee to the accounting firm Mazars USA, LLP is valid and enforceable. As the majority explained, "[c]ontrary to the President's arguments, the Committee possesses authority under both the House Rules and the Constitution to issue the subpoena, and Mazars must comply." *Trump v. Mazars USA, LLP*, — F.3d —, No. 19-5142, 2019 WL 5089748, at *1 (D.C. Cir. Oct. 11, 2019). In an order issued the same day, the Court directed the Clerk to withhold issuance of the mandate until seven days after the disposition of any timely petition for panel rehearing or rehearing en banc. Order (Oct. 11, 2019). This instruction was "without prejudice to the right of any party to move for expedited issuance of the mandate for good cause shown." *Id.*; *see* D.C. Cir. Rule 41(a)(1).

The parties had earlier agreed "to suspend the time for production set by the subpoena during the pendency of this appeal." Joint Mot. to Expedite Appeal at 2

(May 22, 2019); *see Mazars*, 2019 WL 5089748, at *3. The parties further agreed that the "pendency of the appeal" ends at the time the mandate issues. Mazars' compliance with the Committee's subpoena, issued more than six months ago and now adjudicated by this Court to be valid and enforceable, will not take place until the mandate issues.

ARGUMENT

Immediate issuance of the mandate is warranted here to ensure timely compliance with the Committee's valid subpoena, which was issued to further urgent investigations and inform critical legislative judgments. This Court correctly held that the subpoena is valid and enforceable, applying established Supreme Court precedent to the undisputed facts of this case. There is no ground for further review of the panel's decision. *See Johnson v. Bechtel Assocs. Prof'l Corp., D.C.*, 801 F.2d 412, 415 (D.C. Cir. 1986) (per curiam) (discussing standard for immediate issuance of the mandate).

The Supreme Court has instructed courts to "'give[] the most expeditious treatment' to suits seeking to enjoin congressional subpoenas." *Mazars*, 2019 WL 5089748, at *4 (quoting *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 511 n.17 (1975)). Such suits "halt the functions of a coordinate branch," *Eastland*, 421 U.S. at 511 n.17; thus, when "there is a dismissal and an appeal, courts of appeals have a duty to see that the litigation is swiftly resolved," *id.* Issuing the mandate now will avoid further "frustrat[ing]" the Committee's "legislative inquiry." *Id.* at 511.

The Committee issued the challenged subpoena more than six months ago as part of its investigation into serious issues of national importance concerning Executive Branch ethics and conflicts of interest. Since that time, the House has been deprived of documents critical to the exercise of its core legislative and oversight functions. Directing issuance of the mandate now will lift the agreed-upon stay and require Mazars to produce the subpoenaed documents, ensuring that the 116th House can review this material—which the Committee understands is voluminous—and use the information for legislative and oversight purposes before the expiration of its term in January 2021.

This Court's decision affirming the validity and enforceability of the Mazars subpoena is well grounded in established precedent and provides no basis for rehearing. Indeed, President Trump informed the Second Circuit that the majority opinion here correctly "accepted the President's explanation of the governing legal principles." Resp. to Comms.' 28(j) Letter at 1, *Trump v. Deutsche Bank*, No. 19-1540 (2d Cir. Oct. 14, 2019) (28(j) Resp.). To the extent that President Trump disagrees with the panel's application of the law to the facts, *see id.* at 2, in upholding the validity of a Congressional subpoena and affirming a district court ruling, that is not a basis for en banc or Supreme Court review, *see* Fed. R. App. P. 35(b)(1); S. Ct. R. 10(a)-(c).

1. The Committee has a pressing need for documents responsive to the Mazars subpoena to perform its core ongoing legislative and oversight functions. As this Court recognized, the subpoena seeks documents that will inform the Committee's

"review of multiple laws and legislative proposals under [its] jurisdiction." *Mazars*, 2019 WL 5089748, at *10 (quoting Cummings Memo at 4 (Apr. 12, 2019)). The House currently has "pending several pieces of legislation related to the Committee's inquiry." *Id.* Because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change," *id.* at *5 (quoting *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927)), the Committee has an urgent need for this material—both to inform its review of pending legislative proposals and to guide its consideration of future legislation that may be warranted based on the information its investigation reveals.

The subpoenaed documents are also essential to the Committee's performance of a related and equally important constitutional function: oversight of the Executive Branch, including Executive Branch ethics and conflicts of interest. The Committee is engaged in oversight activity to examine whether federal officials—including the President—are making decisions in the country's best interest and not for their own financial gain. Further, the House is now engaged in an impeachment investigation against President Trump, which is advancing on an expedited basis, and information received in response to the Mazars subpoena could be highly relevant to that inquiry as well. Rather than leave Congress with its "oversight function informationally crippled" just "when oversight and legislation are most urgent," *Mazars*, 2019 WL

5089748, at *20, this Court should respect the Committee's need for these documents and direct immediate issuance of the mandate.[1]

2. Further review is very unlikely to be granted. Plaintiffs cannot satisfy the standard for panel rehearing because this Court has not overlooked or misapprehended an important point of law or fact in its decision. *See* Fed. R. App. P. 40(a)(2). In its thorough and well-reasoned 66-page opinion, this Court painstakingly reviewed both controlling Supreme Court and D.C. Circuit precedent, *Mazars*, 2019 WL 5089748, at *4-10; plaintiffs' arguments against the enforceability of the subpoena, *id.* at *11-12; the Department of Justice's position as *amicus curiae*, *id.* at *13-14; and the appropriateness of the particular requests in the subpoena to Mazars, *id.* at *20-21.

There is similarly no basis for rehearing en banc: there is no division of authority within the Circuit, *see* Fed. R. App. P. 35(a)(1), and this case involves the application of settled law in enforcing a subpoena issued to a third party—not the President—and therefore does not raise questions of "exceptional importance," Fed. R. App. P. 35(a)(2). *See* 28(j) Resp. at 1.

[1] The "informational[] crippl[ing]" caused by the delay in receiving documents here is especially acute because, as this Court recognized, *Mazars*, 2019 WL 5089748, at *21, President Trump's financial holdings are arguably more complex than those of past Presidents, he has elected to handle his finances differently from past Presidents, and he has declined to voluntarily release tax-return information that past Presidents have disclosed.

As this Court explained, Congress's power to investigate is broad and "co-extensive with [its] power to legislate." *Mazars*, 2019 WL 5089748, at *7 (quoting *Quinn v. United States*, 349 U.S. 155, 160 (1955)); *see id.* (citing *Watkins v. United States*, 354 U.S. 178, 187 (1957)).[2] The Court correctly concluded that the challenged subpoena was well within the Committee's lawful legislative and oversight authority, *Mazars*, 2019 WL 5089748, at *8-21, recognizing that "the constitutional questions raised here are neither '[g]rave,' nor 'serious and difficult,'" *id.* at *23 (citation omitted) (quoting *United States v. Rumely*, 345 U.S. 41, 48 (1953), and *Tobin v. United States*, 306 F.2d 270, 275 (D.C. Cir. 1962)).

The majority's reasoning is sound. The dissenting opinion, by contrast, advances a novel theory that the subpoena is unenforceable because Congress may only seek "information about the President's wrongdoing," even from third parties, by invoking its impeachment powers and it therefore "does not matter whether the investigation also has a legislative purpose." *Mazars*, 2019 WL 5089748, at *26 (Rao, J., dissenting). The law is settled to the contrary. What matters is the *presence* of a valid purpose, not the *absence* of any other possible use of the subpoenaed materials. *Mazars*, 2019 WL 5089748, at *5 (discussing *Sinclair v. United States*, 279 U.S. 263, 295 (1929)). "[A]ll parties here agree," the panel majority emphasized, "that 'a permissible

[2] *See also Eastland*, 421 U.S. at 504 n.15 ("[T]he power to investigate is necessarily broad."); *Barenblatt v. United States*, 360 U.S. 109, 111 (1959) (describing Congress's investigative power as "broad"); *McGrain*, 273 U.S. at 173-74 (same).

legislative investigation does not become impermissible merely because it might expose law violations.'" *Id.* at *9 (quoting Appellants' Br. 33). Neither President Trump in his individual capacity nor the Department of Justice advanced the dissent's theory that Congress must prove a negative before a court will allow enforcement. Indeed, as the majority opinion notes, "no case law supports the dissent." *Id.* at *19.

The dissent broadly insists that its unprecedented limitation on Congressional subpoenas extends to investigations of wrongdoing by "any impeachable official." *Id.* at *45-46 (Rao, J., dissenting). Adopting that approach would seriously undermine Congress's ability to gather information about wrongdoing by Executive Branch "civil Officers," *see id.* at *33 (quoting Art. II, § 4), including but not limited to the President, and to conduct oversight about the performance of federal agencies in complying with existing laws, without initiating the "grave and weighty process of impeachment," *id.* at *19 (majority opinion).

The dissent would force the House to decide at a very early stage of an investigation whether to make the consequential decision to pursue impeachment without first informing itself about the scope or significance of the conduct at issue, and without gathering sufficient information to determine whether new legislation would serve the country better than an impeachment inquiry. The dissent's view, as the Court correctly observed, would force "Congress to abandon its legislative role at the first scent of potential illegality and confine itself exclusively to the impeachment process." *Id.* at *18. The dissent's theory is totally unworkable as part of a

functioning government and would strongly nudge the House towards impeachment proceedings rather than investigations for possible remedial legislation. This result is surely not what the Framers had in mind when they included Impeachment Clauses in the Constitution.

Finally, the House has begun an impeachment inquiry, which, even under the dissent's theory, would justify the subpoena issued here. Although the Court's carefully considered opinion correctly holds that the subpoena is enforceable even in the absence of such an inquiry, this change in circumstances renders the dissent's approach so limited in application as to make it highly unlikely that further review would be granted.

It is clear from existing Supreme Court case law that the subpoena is enforceable. And any argument for a departure from Supreme Court precedent should be made to the Supreme Court and is not a ground for this Court to delay issuance of the mandate. *Cf. Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, . . . the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

3. If this Court declines to order immediate issuance of the mandate, it should shorten the plaintiffs' time to petition for rehearing or rehearing en banc to seven days from the date of the Court's ruling on this motion. For the reasons previously stated, the Committee has a pressing need for the responsive documents, and a

rehearing petition is quite unlikely to succeed. Moreover, the parties were able to brief the merits of this appeal on a highly expedited schedule with only twenty-one days for the response brief and eight days for the reply. *See* Order (May 23, 2019).

The issues in the case have been thoroughly briefed and carefully decided. There is no need for protracted rehearing proceedings. If this Court declines to direct that the mandate issue immediately, the Committee respectfully submits that it should not have to wait for an additional extended period to receive the benefit of the judgment in its favor.

CONCLUSION

There is no ground for further review of the majority's well-reasoned opinion. The Committee therefore respectfully moves the Court to direct the Clerk to issue the mandate immediately. In the alternative, the Committee seeks an order shortening the time to petition for rehearing or rehearing en banc to seven days from the date of this Court's ruling on this motion.

Respectfully submitted,

/s/ Douglas N. Letter

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October 16, 2019

CERTIFICATE OF COMPLIANCE

This motion complies with Fed. R. App. P. 27(d)(2) because it contains 2,173 words, excluding the parts that can be excluded. This motion also complies with Fed. R. App. P. 27(d)(1)(E) because it is prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2016 in 14-point Garamond type.

/s/ Douglas N. Letter
Douglas N. Letter

CERTIFICATE OF SERVICE

I certify that on October 16, 2019, I filed a copy of the foregoing document via this Court's CM/ECF system, which I understand caused service on all registered parties.

/s/ Douglas N. Letter
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